

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

JAN 9 1 52 PM '95

MM Docket No. 92-316

In re Applications of

RIVERTOWN
COMMUNICATIONS
COMPANY, INC.

File No. BPH-911008ME

SAMPLE
BROADCASTING
COMPANY, L.P.

File No. BPH-911010MA

For Construction Permit for a
New FM Station on Channel 282C3,
Eldon, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1994; Released: January 9, 1995

By the Review Board: MARINO (Chairman) and
GREENE.

1. The Review Board has before it for consideration a Joint Request for Approval of Settlement Agreement filed November 4, 1994 by Rivertown Communications Company, Inc. and Sample Broadcasting Company, L.P. The Joint Request is accompanied by an Agreement that contemplates grant of Sample's application and dismissal of Rivertown's application in exchange for: (1) assignment to Rivertown of whatever rights Sample may have to a refund from the Commission of Sample's hearing fee; and (2) payment of \$19,000 by Sample to Rivertown. On December 21, 1994, Rivertown supplemented the Joint Request with a declaration of counsel documenting the legal expenses it incurred in prosecuting its application. The Mass Media Bureau commented in support on December 22, 1994.

2. Both Sample and Rivertown were found to be basically qualified in *Rivertown Communications Co., Inc.*, 8 FCC Rcd 7928 (ALJ 1993), and the Sample application was selected on the basis of the comparative criteria in the now partially discredited *Policy Statement on Comparative Broadcast Hearings*, 1 FCC Rcd 393 (1965).¹ In reaching this conclusion, the presiding officer below resolved designated strike application and real-party-in-interest issues favorably to Sample. Exceptions filed by Rivertown and Contingent Exceptions filed by Sample, and replies to each, have continued in pending status pursuant to Public Notice, FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), and Public Notice, Modification of FCC Com-

parative Proceedings Freeze Policy, FCC 94-204 (Aug. 4, 1994), issued in light of *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (integration criteria applied to mutually exclusive broadcast applicants are arbitrary and capricious and unlawful).

3. The Joint Request fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 that govern settlement agreements. Both parties have stated under penalty of perjury that there is no other consideration for dismissal of Rivertown's application other than the contemplated payment of Rivertown's expenses, they did not file their applications for the purpose of entering into a settlement agreement, and approval of the agreement will permit the early establishment of a first radio service in Eldon. Rivertown has further stated under penalty of perjury that the proposed payment is less than its legitimate and prudent expenses in prosecuting its application, and it has submitted supportive documentation showing that its expenses exceed the proposed \$19,000 expense reimbursement. In addition, any payment Riverside might receive pursuant to the assignment of Sample's possible right to a hearing fee refund would not exceed Riverside's documented expenses, even when added to the proposed expense reimbursement.

4. In its pre-settlement exceptions, Rivertown attacked the ALJ's conclusion that Sample is basically qualified under the real-party-in-interest issue. We have reviewed these exceptions and find no basis therein to disturb the ALJ's conclusion that Sample's principal "will be in complete overall control of the Eldon station." *Id.* at ¶ 95. At the time Sample's sole general partner, Carmela Sample-Day, applied for the station, she was news director at KKSI(FM), Eddyville, Iowa, which was licensed to O-Town Communications, Inc. The ALJ found that a minority owner of O-Town, Mark McVey, who was also its chief engineer, had looked into an Eldon station as a good business opportunity for O-Town and had also considered some programming arrangement between KKSI and an Eldon station. Bruce Lindner, another O-Town principal, briefly considered pursuing the station but let the matter drop because of the disinterest of his father, also an O-Town principal. In the meantime, Sample-Day asked McVey for advice about pursuing the channel and approached Lindner about joining her in an application. Lindner became the Sample sole limited partner, a passive role that he has maintained throughout. *Id.* at ¶¶ 29-44. As she prepared her application, Sample-Day solicited and paid for McVey's assistance in selecting her site and evaluating equipment. *Id.* at ¶¶ 53-55, 59.

5. The real-party-in-interest issue arose because of statements McVey made to Riverside principal David W. Brown about Lindner control of the Sample applicant. McVey testified at hearing that he was not privy to any conversations or information that would support any statements he may have made to Brown, his statements were not based on any personal knowledge, Mrs. Sample-Day was an enthusiastic applicant, and he was merely expressing his own frustrations with his position at O-Town. *Id.* at ¶¶ 75-77, 81. The ALJ, who heard the testimony of the witnesses, found McVey's explanation to be credible, particularly since McVey had not known the details of the business relationship between Sample-Day and Lindner and had incorrectly presumed Lindner would be a voting

¹ See *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

shareholder. *Id.* at ¶ 91. He also found that Sample-Day was experienced in broadcasting, was the sole driving force behind the application, and acted independently of Lindner throughout. *Id.* at ¶ ¶ 92-95. Rivertown's exceptions attacked McVey's credibility, alleging that he had showed a propensity to deceive the Commission in an unrelated proceeding, and argued that the record as a whole warrants conclusions adverse to Sample. In light of the deference this Board must give to the credibility findings of the presiding officer, who has observed the testimony of the witnesses first hand, and the substantial evidence supporting these findings, Riverside's exceptions do not establish that Sample is unqualified for a grant pursuant to the settlement agreement. See *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd 6412, 6415-16 ¶17 (Rev. Bd. 1994), citing *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985); *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987) (subsequent history omitted). When McVey's testimony is considered along with the testimony of other witnesses to Sample's conduct in pursuing its application, the record as a whole does not require that Sample be found unqualified under this issue.

6. Finally, Sample has filed a Contingent Petition for Leave to Amend and Amendment withdrawing and deleting the integration, divestiture and diversification commitments previously made in this proceeding for comparative advantage. Sample reports that Sample-Day is no longer working at any radio station, which satisfies the divestiture/diversification commitment Sample made when preparing for the comparative hearing. In light of *Bechtel*, the Commission relieved applicants prevailing pursuant to settlement agreements of any obligation to adhere to their integration proposals. FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055. Thus, Sample's amendment is consistent with Commission policy and will be accepted.

7. ACCORDINGLY, IT IS ORDERED That the Joint Request for Approval of Settlement Agreement, filed November 4, 1994 by Sample Broadcasting Company, L.P. and Rivertown Communications Company, Inc., as supplemented December 21, 1994, IS GRANTED, and the attached Agreement IS APPROVED; that the Contingent Petition for Leave to Amend filed November 21, 1994 by Sample Broadcasting Company, L.P. IS GRANTED and the amendment IS ACCEPTED; that the Petitions for Leave to Amend filed April 4 and September 30, 1994 by Rivertown Communications Company, Inc. ARE DISMISSED as moot; that the Exceptions of Rivertown Communications Company, Inc. and the Contingent Exceptions of Sample Broadcasting Company, L.P. filed December 10, 1993 ARE DISMISSED; that the application of Rivertown Communications Company, Inc. (File No. BPH-911008ME) IS DISMISSED; that the application of Sample Broadcasting Company, L.P. (File No. BPH-911010MA), as amended, IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board